

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KAREEN ANDERSON,

Plaintiff,

V.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:18-CV-02173-JAD-EJY

Order re Counts 1, 4, 5, 6, and 7.

Report and Recommendation to Dismiss Counts 2 and 3 With Prejudice.

11 Before the Court is Plaintiff Karen Anderson's first amended Civil Complaint (ECF No.
12 25), which responds to the Court's August 9, 2019 Order (ECF No 24) dismissing Plaintiff's *Bivens*
13 claim, malicious prosecution claim, and medical and nutritional neglect claim with leave to amend.¹
14 Hereinafter ECF No. 25 is referred to as the First Amended Complaint. Plaintiff's defamation claim
15 was dismissed with prejudice, and Plaintiff's negligence claim against CoreCivic and the named
16 members of the prison medical staff were allowed to proceed as pled. Plaintiff's *in forma pauperis*
17 status was granted on June 21, 2019.²

18 The Court now screens Plaintiff's First Amended Complaint in accordance with the
19 requirements of 28 U.S.C. § 1915(A), and the case law standards discussed in detail in ECF No. 14
20 at 2:8-3:11.

FACTS ALLEGED IN THE FIRST AMENDED COMPLAINT

22 || 1. Bivens – Count 1

23 Plaintiff alleges that three FBI Special Agents (Ryan Burks, Jonathan Rowe, and Kennedy
24 Weesayma) arrested him on November 1, 2016, before a warrant was issued and before an
25 indictment was returned by the Grand Jury.³ In support of this claim, Plaintiff attaches FD-302

²⁶ ¶ 1 ECF No. 24 at 2:7-8; 8:18-20.

27 2 EFC No. 14.

28 || 3 ECE No. 25 at 2:25 - 3:7

1 forms, completed by Special Agents Burke and Weesayma, dated November 2 and 7, 2016, in which
 2 they say the following, respectively:

3 On November 1, 2016, at approximately 10:45 a.m., members of the Las
 4 Vegas Safe Streets Gang Unit ... arrested Karen Anderson Anderson
 5 was arrested pursuant to a Federal arrest warrant issued on November 1,
 6 2016 . . .^[4]

7 And,

8 On November 1, 2016, SA Ryan Burke and SA Jonathan Rowe attempted
 9 to interview Karen Anderson ... following his arrest.

10 Plaintiff also attaches and discusses the docket sheet in his underlying criminal case, Case
 11 No. 2:16-cr-305 (the “Criminal Case”),⁵ which the Court reviewed through the Court-sponsored
 12 electronic filing system. A review of ECF No. 5 on the criminal case docket sheet shows Minutes
 13 of Proceedings that started on November 1, 2016 at 1:16 p.m. and ended at 1:18 p.m., during which
 14 time the Grand Jury return was received by the Court followed by the issuance of arrest warrants for
 15 Plaintiff and his co-defendants.⁶ Exactly when the indictment was filed is unknown at this point,
 16 but the Minutes of Proceedings demonstrate that the warrant would not have issued before 1:18 p.m.
 17 on November 1.⁷

18 Plaintiff argues that (1) a warrant arising from an indictment is not “official until it is stamped
 19 by the clerk of the court,” therefore the arrest was without a warrant in violation of Plaintiff’s Fourth
 20 Amendment rights, (2) “F.R.Crim.P Rule 4 was violated and a probable cause defense was
 21 abandoned and should not be excepted,” (3) Rule 5 was violated because it took “an entire day” for
 22 Plaintiff to appear for his initial appearance, and (4) Rule 9 was violated because there was “no
 23 affidavit in support of that [sic] warrant.”⁸

24 ⁴ ECF No. 25-1, pp. 2 and 4 (emphasis added).

25 ⁵ *Id.*, p. 2.

26 ⁶ ECF No. 25 at 5:11-13.

27 ⁷ ECF No. 25-1 p. 6.

28 ⁸ ECF No. 25 at 5:14-6:3.

1 Plaintiff's arrest warrant was filed in Court on November 3, 2016.⁹ The bottom portion titled
 2 "Return" was completed by an unknown signatory "for [the] FBI" and shows that "[t]his warrant
 3 was received on ... 11/01/2016, and the person was arrested on ... 11/02/2016 at ... Las Vegas,
 4 NV."¹⁰ The document is then dated 11/02/2016.¹¹ The U.S. Pretrial Services/U.S. Marshals Service
 5 Arrest Intake Form shows the "Date arrested or booked" as November 1, 2016, and that Plaintiff
 6 arrived "at USMS 11/2/16 @0915."¹² Plaintiff states that the "warrant return ... Falsely [sic] claims
 7 that the execution of the warrant to arrest the plaintiff took place November 2nd, [sic] 2016."¹³

8 Plaintiff claims injuries in the form of his arrest without a warrant and before an indictment
 9 was returned (also termed by Plaintiff as "Trespass on constitutional rights"), loss of his daughter to
 10 DFS custody, and "[r]ights to due process of F.R.C.P. Rules 3, 4, and 5 disregarded." *Id.* at 6:17-
 11 7:6.

12 2. Malicious Prosecution- Count 2

13 The Court previously concluded that Plaintiff exhausted administrative remedies as required
 14 before Plaintiff could bring this claim under the Federal Tort Claims Act ("FTCA").¹⁴ Thus, the
 15 only issue before the Court is whether, upon amendment, Plaintiff now states a malicious prosecution
 16 claim upon which relief may be granted. The Court applies the law of the State of Nevada when
 17 analyzing whether Plaintiff states a cause of action for malicious prosecution.¹⁵

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⁹ ECF No. 19 in the Criminal Case.

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¹⁰ ECF No. 25-1, p. 10 of 67.

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¹¹ *Id.*

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¹² *Id.*; *see also* ECF No. 25 at 4.

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¹³ ECF No. 25 at 4:24-5:2.

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¹⁴ ECF No. 14 at 5:28-6:1

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¹⁵ 28 U.S.C. § 1346(b)(1); *Aguilar v. United States*, 920 F.2d 1475, 177 (9th CIR. 1990), abrogated on other grounds by *United States v. Olson*, 546 U.S. 43, 46, (2005).

1 To state a claim for malicious prosecution, Plaintiff must allege (1) that the defendant lacked
 2 probable cause to initiate a prosecution, (2) malice, (3) the prior criminal proceedings were
 3 terminated in his favor, and (4) Plaintiff suffered damages.¹⁶ In his First Amended Complaint,
 4 Plaintiff alleges that facts were fabricated or contradictory as stated by law enforcement, Plaintiff
 5 had no involvement in acts with which he was charged or on which charges were based, Plaintiff did
 6 not violate the law, and the government failed to produce video evidence.¹⁷

7 3. Imputed Negligence – Count 3

8 Plaintiff states that he brings this claim against the United States as the only proper defendant
 9 in a FTCA action.¹⁸ After stating the law, Plaintiff makes that following assertion:

10 Pursuant to (Title 42 U.S.C. § 1993).

11 This Due Process violation & 8th Amendment violations is
 12 upon Core Civic, Core Civic's N.S.D.C. facility Doctor
 13 Sevedra, and Nurse Ubina. In individual capacity, as issues
 14 initiated in pretrial proceedings.

15 I have completed the grievance system and the response
 16 returned from the chief of medical staff. I present this
 17 grievance in compliance and satisfaction of **TITLE 42**
 18 **U.S.C. § 1997e**. *See Exhibit*^[19]

19 (Emphasis in original.) The only other facts set forth by Plaintiff is that this claim “is a complaint
 20 on Core Civic, [sic] Doctor Saavedra and Nurse Ubina in their individual and official capacity for
 21 neglect, due to [the] protocol of Doctor’s policy, that did deprived [sic] me [of my] medical and
 22 nutritional needs.”²⁰

23 4. Medical Neglect – Count 4

24 Plaintiff alleges a violation of the Due Process Clause of the Fourteenth Amendment based
 25 on what he terms to be “severely infected toenails and . . . toes” that produce “an odor” that Plaintiff

26 ¹⁶ *La Mantia v. Redisi*, 38 P.3d 877, 888 (Nev. 2002).

27 ¹⁷ ECF No. 25 at 8:4-13:2.

28 ¹⁸ *Kennedy v. United States Postal Service*, 145 F.3d 1077, 1078 (9th Cir. 1998).

29 ¹⁹ EFC No. 25 at 14:3-6.

30 ²⁰ *Id.* at 14:10-12.

1 did not disclose to the doctor.²¹ Plaintiff concludes this cause of action stating that “[h]ad it not been
 2 for the neglect of medical treatment with in [sic] these two years, this infection would not be.”²²

3 5. Nutritional Neglect – Count 5

4 Plaintiff brings this claim against Dr. Saavedra “because ultimately the decision to from [sic]
 5 determining [sic] a food diet is his.”²³ Plaintiff states that his medical files include some notation
 6 that his health is dependent upon a meat and dairy free diet; that his kosher food, which is mainly
 7 soy based, sometimes contains whey, which he cannot eat and to which he has a “bad reaction”; that
 8 despite efforts by the “facility,” the policy is a medical one ultimately lying with Dr. Saavedra;
 9 nothing prevents Dr. Saavedra from ordering a diet that complies with his needs of which the doctor
 10 is aware based upon his reaction to minute consumption of foods he cannot eat, but which are
 11 “accidentally placed in … [his] Kosher trays numerous times”; and, that “soy is completely
 12 discontinued and meat & vegetables dinner [sic] are 6 days a week with one vegan day.”²⁴ Plaintiff
 13 lists his injuries, which include “[n]umerous reactions due to undetectable consumption” which is
 14 followed by Plaintiff’s citation to the deliberate indifference standard required to state an Eighth
 15 Amendment claim.²⁵

16 6. Medical Neglect – Count 6

17 Plaintiff brings this claim against Dr. Saavedra and Nurse Ubina in their individual and
 18 official capacities.²⁶ In sum, Plaintiff claims he had an injured back, asked to be placed in a medical
 19 unit because he was unable to protect himself, but was cleared for the general population.²⁷ His
 20 request was neglected and a prison riot broke out resulting in injuries to Plaintiff including being hit

21 *Id.* at 14:15-25.

22 *Id.* at 14:19-20.

23 *Id.* at 15:2-3.

24 *Id.* at 15:3-24.

25 *Id.* at 16:2-5.

26 *Id.* at 16:8-9.

27 *Id.* at 16:10-12.

1 in the face and leg with flying objects and being pepper sprayed.²⁸ Plaintiff says that after the
 2 incident he again pleaded with Dr. Saavedra and Nurse Ubina to be in the medical housing unit, but
 3 his requests were denied despite Plaintiff's contention that others sought to assist him with this
 4 request.²⁹ Plaintiff goes on to state that pain medication was delayed and, when finally given, he
 5 reacted badly to the first prescription and the second was taken during "a shake down" due to "errors
 6 in the medical computer"; he has never received blood work for which he was scheduled for
 7 nutritional needs or results from a TB test; never received a follow up appointment for injured knees
 8 and feet due to the lack of arch supports in shoes; and, there has been "no response to complaint of
 9 other issued medication that caused ...[Plaintiff] to have rashes and painful reactions.³⁰ Plaintiff
 10 claims his injuries include "[a]gitated and prolonged back injuries ... [, l]eg, face and eye injuries[,
 11 and] ... [p]ainful reaction to finally describe [sic] medication ignored and disregarded."³¹

12 7. Imputed Negligence – Count 7

13 Plaintiff's second imputed negligence claim is against CoreCivic as the employer of all who
 14 are mentioned in his complaint because, Plaintiff contends, none of the events he complains of would
 15 have happened but for their employment by CoreCivic. On this basis, Plaintiff contends, CoreCivic
 16 is responsible for the negligent acts of its employees.³²

17 DISCUSSION

18 1. Plaintiff states a viable *Bivens* violation.

19 *Bivens* established that "victims of a constitutional violation by a federal agent have a right
 20 to recover damages against the official in federal court despite the absence of any statute conferring

24 ²⁸ *Id.* at 16:13-15.

25 ²⁹ *Id.* at 16:16-20.

26 ³⁰ *Id.* at 16:20-17:6.

27 ³¹ *Id.* at 17:7-8.

28 ³² *Id.* at 17:15-18.

1 such a right.”³³ A cause of action under *Bivens* is therefore a judicially created counterpart to civil
 2 rights actions under 42 U.S.C. § 1983 for claims against federal officers, who ordinarily do not act
 3 under color of state law.

4 In *Bivens*, the Supreme Court “recognized … an implied private action for damages against
 5 federal officers alleged to have violated a citizen’s constitutional rights.”³⁴ In doing so, the Supreme
 6 Court established that “federal courts have the inherent authority to award damages against federal
 7 officials to compensate plaintiffs for violations of their constitutional rights.”³⁵ The Supreme Court
 8 recognized that an implied private cause of action arises when law enforcement officials violate a
 9 plaintiff’s Fourth Amendment right by executing a warrantless search of a plaintiff’s home.³⁶

10 The Fourth Amendment protects “[t]he right of people to be secure in their persons, houses,
 11 papers, and effects, against unreasonable search and seizure.” U.S. Const. amend. IV. An arrest
 12 made without a warrant requires probable cause.³⁷ An arrest made without probable cause or other
 13 justification provides the basis for a claim of unlawful arrest under § 1983 as a violation of the Fourth
 14 Amendment.³⁸ “If an officer has probable cause to believe that an individual has committed even a
 15 very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest
 16 the offender.”³⁹

17 Here, in Plaintiff’s First Amended Complaint he states his *Bivens* claim arises under 42
 18 U.S.C. § 1983, and specifically alleges a Fourth Amendment violation. Plaintiff also references
 19 violations of the Rules of Criminal Procedure 4, 5, and 9.⁴⁰ Plaintiff alleges that he was arrested and
 20 detained on November 1, 2016, at approximately 10:00 a.m. before a warrant was issued and before

21 ³³ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

22 ³⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66, (2001) (citing *Bivens*, 403 U.S. at 391).

23 ³⁵ *W. Ctr. For Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir.2000) (citations omitted).

24 ³⁶ *Bivens*, 403 U.S. at 391.

25 ³⁷ *Gilker v. Baker*, 576 F.2d 245, 246 (9th Cir. 2001)

26 ³⁸ *Dubner v. City of San Francisco*, 266 F. 3d 959 (9th Cir. 2001).

27 ³⁹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

28 ⁴⁰ ECF No. 25 at 2:16-20; 19:3-5.

1 an indictment was returned.⁴¹ Plaintiff further alleges that this claim is clearly supported by the FD-
 2 302 forms completed by Special Agents Burke and Weesayma, as well as by the docket sheet in his
 3 Criminal Case and the U.S. Pretrial Services/U.S. Marshals Service Arrest Intake Form.⁴² In fact,
 4 each of these documents evidence a substantial question of fact regarding whether, at 10:45 a.m. on
 5 November 1, 2016, a warrant had issued or an indictment was returned, thereby supporting, at this
 6 stage of proceedings, a colorable claim that Plaintiff was arrested without either document in place.

7 Moreover, despite consistent evidence that appears to support the contention that Plaintiff
 8 was arrested on November 1, 2016, the return of the warrant states Plaintiff was arrested on
 9 November 2, 2016. Plaintiff asserts this false claim, together with the warrant information form
 10 indicating the person being arrested is female, are further violations of his Fourth Amendment
 11 rights.⁴³

12 To state a claim under *Bivens*, a plaintiff must allege that an individual defendant personally
 13 committed a specific wrongful act that violated a well-established constitutional right of which a
 14 reasonable person would have known. *Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir. 1987). Plaintiff
 15 asserts these elements by discussing and offering documents that strongly suggest that three officers
 16 (Burks, Rowe, and Weesayma) arrested him on November 1, 2016, at 10:45 a.m. without a warrant
 17 and without the return of an indictment.⁴⁴ Again, the docket sheet in Plaintiff's Criminal Case shows
 18 that the Grand Jury did not appear before Judge Hoffman until 1:16 p.m. on November 1, 2016. The
 19 Intake Form shows that Plaintiff arrived in USMS custody at 9:15 a.m. on November 2, 2016, after
 20 being arrested on November 1, 2016, at which time he was transported to the Henderson, Nevada,
 21 Detention Center.⁴⁵ If Plaintiff was arrested on November 2, 2016, he could not have been in the
 22 Henderson, Nevada, Detention Center on November 1, 2016 for the same arrest. Thus, while the
 23 return of an indictment and the issuance of a warrant both establish probable cause to arrest, and the

24 ⁴¹ *Id.* at 3:1-6.

25 ⁴² ECF No. 25-1 at 2, 4, 6, and 14 of 67.

26 ⁴³ ECF No. 25 at 4:23-5:8.

27 ⁴⁴ ECF No. 25-1 at 2, 4, 6, 10, and 14 of 67.

28 ⁴⁵ ECF No. 25-1 at 14 of 67.

1 issuance of an indictment precludes the need for an affidavit in support of a warrant, Plaintiff's
 2 allegations are sufficient to demonstrate that individual defendants, in their individual capacities,
 3 may have committed a wrongful act in violation of Plaintiff's Fourth Amendment rights.⁴⁶ This is
 4 enough at this complaint-screening stage to allow this claim to proceed as stated in the Order below.

5 **2. Malicious Prosecution**

6 As stated above, to state a claim for malicious prosecution, Plaintiff must allege (1) that the
 7 Defendant lacked probable cause to initiate a prosecution, (2) malice, (3) the prior criminal
 8 proceedings were terminated in his favor, and (4) Plaintiff suffered damages.⁴⁷ Here, Plaintiff's
 9 malicious prosecution claim fails because Plaintiff cannot establish that criminal proceeding were
 10 terminated in his favor.

11 The Circuit Courts are uniform in holding that a finding that criminal proceedings terminated
 12 in Plaintiff's favor requires that the underlying criminal proceedings were concluded in a way that
 13 indicates the innocence of the accused. This requirement is *not* met through a plea agreement even
 14 if other charges are dismissed.⁴⁸ As stated by the Ninth Circuit Court of Appeals in *Smithart v.*

15 ⁴⁶ Fed. R. Crim. P. 4 speaks to affidavits filed with a criminal complaint. Plaintiff's arrest was
 16 predicated on an indictment not a complaint. Fed. R. Crim. P. 5 addresses initial appearances. Plaintiff
 17 appeared before Magistrate Judge Hoffman on November 2, 2016 at approximately 3:16 p.m. ECF No. 9,
 18 Case No. 16-cr-305. This is less than 48 hours after his arrest and is, therefore, presumptively reasonable.
 19 *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Fed. R. Crim. P. 9 is titled "Arrest Warrant or
 20 Summons on an Indictment or Information." Although the language of this Rule may confuse Plaintiff, the
 21 1979 Advisory Committee Notes make clear that an affidavit in support of an arrest warrant is unnecessary
 22 following an indictment that, fair on its face, determines the existence of probable cause. Thus, while Plaintiff
 23 states a *Bivens* claim for his arrest without the return of an indictment or issuance of a warrant, Plaintiff's
 24 Rule 4 and 9 violations are subsumed in the *Bivens* action, and Plaintiff fails to state a Rule 5 violation. Thus,
 25 the Court recommends these claims be dismissed with prejudice. As the Rules were either not applicable or
 26 were not violated, no Due Process violation occurred. See *U.S. v. Celani*, Case No. 84-30032, 2012 WL
 27 6553280 at *3-4 (C.D. Ill. December 12, 2012).

28 ⁴⁷ *La Mantia*, 38 P.3d at 888.

29 ⁴⁸ *Pittman v. Metuchen Police Dep't*, 441 Fed.Appx. 826, 829–30 (3d Cir. 2011) (a favorable
 30 termination does not include a dismissal of certain counts as part of a plea agreement); *White v. Brown*, 408
 31 Fed.Appx. 595, 599 (3d Cir. 2010) (when a charge is dismissed as a part of a plea bargain involving a guilty
 32 plea to some unrelated charge, the dismissal nevertheless is not a favorable termination); *Uboh v. Reno*, 141
 33 F.3d 1000, 1005 (11th Cir.1998) (noting that "courts have found that withdrawal of criminal charges pursuant
 34 to a compromise or agreement does not constitute favorable termination ..."); *Taylor v. Gregg*, 36 F.3d 453,
 35 455-56 (5th Cir.1994) (holding that pretrial diversion agreement, in which accused must acknowledge
 36 responsibility for offense conduct, "does not terminate the criminal action in favor of the criminal defendant
 37 for purposes of bringing a malicious prosecution claim"); *Singleton v. City of New York*, 632 F.2d 185, 193
 38 (2nd Cir.1980) ("[n]o purpose would be served in dismissing the criminal case if the issue of guilt or
 39 innocence were in any event to be litigated in a civil suit").

1 *Towery*, a plea bars subsequent claims that the defendant lacked probable cause to charge the
 2 Plaintiff.⁴⁹ Thus, Plaintiff's malicious prosecution claim fails as a matter of law based on Plaintiff's
 3 decision to plead guilty to Count One of the indictment.⁵⁰

4 The Court therefore recommends that Plaintiff's Malicious Prosecution claim be dismissed
 5 with prejudice.

6 3. Imputed Negligence – Count 3

7 Liberally interpreting Plaintiff's First Amended Complaint, as the Court must,⁵¹ a plaintiff
 8 must nonetheless provide more than mere labels and conclusions to support his claim.⁵² A formulaic
 9 recitation of the elements of a cause of action is insufficient.⁵³ All or part of a complaint filed by a
 10 prisoner may therefore be dismissed *sua sponte* if the prisoner's claims lack an arguable basis either
 11 in law or fact. This includes claims based on legal conclusions that are untenable (e.g. claims against
 12 defendants who are immune from suit or claims of infringement of a legal interest which clearly
 13 does not exist), as well as claims based on fanciful factual allegations (e.g. fantastic or delusional
 14 scenarios).⁵⁴

15 Here, the entirety of Plaintiff's third cause of action for Imputed Negligence says only that
 16 the claim is brought under the FTCA, that this is a due process claim and Eighth Amendment
 17 violation claim against CoreCivic, that Dr. Saavedra and Nurse Ubina deprived Plaintiff of his
 18 medical and nutritional needs, that he is suing the doctor and nurse in their individual and official
 19 capacities, and that Plaintiff has exhausted the grievance procedures.⁵⁵

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21 ⁴⁹ 79 F.3d 951, 952 (9th Cir. 1996).

22 ⁵⁰ ECF No. 227 and 228 in Case No. 16-cr-305

23 ⁵¹ *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir.
 24 1996).

25 ⁵² *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-1965 (2007).

26 ⁵³ *Id., Papasan v. Allain*, 478 U.S. 265, 286 (1986).

27 ⁵⁴ *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798
 (9th Cir. 1991).

28 ⁵⁵ ECF No. 25 at 13:24-14:12.

1 Even a liberal construction of these allegations in Plaintiff's Third Claim for relief fail to
 2 state a claim upon which relief may be granted. Plaintiff provides no facts to support his claim.
 3 Instead, Plaintiff states a conclusion without a single fact alleged. Therefore, the Court recommends
 4 that this claim, as stated, be dismissed with prejudice.

5 4. Medical and Nutritional Neglect – Counts 4, 5, 6, and 7

6 Counts 4 and 6 of Plaintiff's First Amended Complaint alleges medical neglect against Dr.
 7 Saavedra and Nurse Ubina in their individual and official capacities. Counts 4 and 7 also alleges
 8 medical neglect against CoreCivic. Count 4 states Plaintiff's claim is brought under the Fourteenth
 9 Amendment.⁵⁶ Count 5 alleges that, despite knowledge of specific nutritional needs related to
 10 Plaintiff's health, these needs have been at least neglected and at best ignored by Dr. Saavedra
 11 resulting in reactions causing Plaintiff a need for medical attention.⁵⁷ Plaintiff does not state a
 12 specific basis for this claim, but does reference the deliberate indifference standard applicable to
 13 Eighth Amendment violations. Count 6 cites only the standard for claims asserted in a defendant's
 14 official capacity, which does not apply here.⁵⁸ Count 7 for "Imputed Negligence" is silent with
 15 respect to the legal basis for the claim, but, construed liberally, states that CoreCivic is liable under
 16 state law based on the theory of respondeat superior.⁵⁹

17 The Court exercises its discretion to liberally construe Plaintiff's claims against Dr. Saavedra
 18 and Nurse Ubina, as well as against CoreCivic, as arising under state law.⁶⁰ As explained in

20 ⁵⁶ *Id.* at 14:24.

21 ⁵⁷ *Id.* at 17:2-18

22 ⁵⁸ Liberally construing Plaintiff's claims, the Court infers that Plaintiff is bringing an action against
 23 Defendants Dr. Saavedra and Nurse Ubina in their individual capacity only, and not in their official capacity,
 24 as no cause of action in the official capacity exists. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th
 25 Cir.1988); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th
 26 Cir.2007). To the extent Plaintiff asserts he is bringing claims against Dr. Saavedra and Nurse Ubina in their
 27 official capacities, the Court recommends these claims be dismissed with prejudice. *Daly-Murphy*, 837 F.2d
 28 at 355 ("a *Bivens* action can be maintained against a defendant in his or her individual capacity only, and not
 in his or her official capacity) (citation omitted).

29 ⁵⁹ ECF No. 25 at 17:15-18.

30 ⁶⁰ *Wilhelm v. Rotman*, 680 F.3d 1113, 1121, 1123 (9th Cir.2012) citing *Hebbe v. Pliler*, 627 F.3d 338,
 342 (9th Cir.2010) ("where the petitioner is *pro se*, particularly in civil rights cases, [courts should] construe
 the pleadings liberally and ... afford the petitioner the benefit of any doubt").

1 numerous cases, *Bivens* actions are limited and, when the allegations focus on the kind of conduct
 2 that typically falls within the scope of traditional state tort law, federal claims pursuant to *Bivens* are
 3 precluded. *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (“*Bivens*’ limited holding
 4 may not be extended to confer a right of action for damages against private entities acting under
 5 color of federal law”). The *Malesko* Court held:

6 If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may
 7 bring a *Bivens* claim against the offending individual officer, subject to the defense
 8 of qualified immunity. The prisoner may not bring a *Bivens* claim against the
 9 officer’s employer, the United States, or the BOP. With respect to the alleged
 10 constitutional deprivation, his only remedy lies against the individual ...

11 *Id.* at 72. However, “federal prisoners in private facilities enjoy a parallel tort remedy that is
 12 unavailable to prisoners housed in Government facilities.” *Id.* at 72-73. Plaintiff is housed at the
 13 Nevada Southern Detention Center in Pahrump, which is a private facility run by CoreCivic,
 14 previously known as Corrections Corporation of America (“CCA”).⁶¹

15 To state a claim for negligence under Nevada law, a plaintiff must allege that (1) the
 16 defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was
 17 the legal cause of the plaintiff’s injuries, and (4) the plaintiff suffered damages.⁶² Here, in Plaintiff’s
 18 Counts 4, 6 and 7 he alleges that the medical staff and CoreCivic had a duty to properly treat his
 19 medical conditions related to his toes, toenails, face, leg, back, and medications that caused a painful
 20 reaction. Plaintiff also asserts neglect for his feet and knees, nutritional neglect by Dr. Saavedra and
 21 CoreCivic. In sum, Plaintiff alleges that Dr. Saavedra, Nurse Ubina, and CoreCivic as their
 22 employer, breached the duty of care by failing to properly treat his medical needs, causing him harm
 23 by virtue of their neglect resulting in injuries. Accepting these allegations are true, Plaintiff states a
 24 claim for negligence against Dr. Saavedra, Nurse Ubina, and against CoreCivic under the theory of
 25 respondeat superior.

26
 27 ⁶¹ The website for this entity states: “CCA founded the private corrections management industry three
 28 decades ago, establishing industry standards for future-focused, forward-thinking correctional solutions.”
<http://staging.cca.com/who-we-are>.

⁶² *Sadler v. PacificCare of Nev.*, 130 Nev. 990, 340 P.3d 1264 (2014).

CONCLUSION

1. Order

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that the following claims shall proceed as pled:

- Plaintiff Karen Anderson's Count 1 – *Bivens* Action against agents Burke, Rowe, and Kennedy, in their individual capacities, and
- Counts 4, 5, 6, and 7 for state law negligence against Dr. Saavedra and Nurse Ubina in their individual capacities, and CoreCivic under respondeat supereor.

shall proceed as pled.

9 **IT IS FURTHER ORDERED** that the Clerk of the Court **SHALL** issue summons to
10 Defendants FBI Special Agents Ryan Burks, Jonathan Rowe, Kennedy Weesayma, CoreCivic, Dr.
11 Saavedra, and Nurse Ubina and deliver the summons to the U.S. Marshal for service. The Clerk of
12 the Court **SHALL** send the required USM-285 forms to Plaintiff. Plaintiff shall have twenty (20)
13 days to furnish the required USM-285 forms to the U.S. Marshal at 333 Las Vegas Blvd. South,
14 Suite 2058, Las Vegas, Nevada 89101. After Plaintiff receives copies of the completed USM-285
15 forms from the U.S. Marshal, he has twenty (20) days to file a notice with the Court identifying if
16 the Defendants were served. If Plaintiff wishes to have the U.S. Marshal attempt service again on
17 any unserved defendant, then a motion must be filed with the Court identifying the unserved
18 defendant, specifying a more detailed name and address and indicating whether some other manner
19 of service should be used. Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service
20 must be accomplished within one hundred twenty (90) days from the date that the complaint was
21 filed.

22 **IT IS FURTHER ORDERED** that Plaintiff shall serve upon Defendants, or their attorney
23 if they have retained one, a copy of every pleading, motion, or other document submitted for
24 consideration by the Court. Plaintiff shall include with the original paper submitted for filing a
25 certificate stating the date that a true and correct copy of the document was mailed to Defendants or
26 their counsel. The Court may disregard any paper received by a district judge, magistrate judge, or
27 the Clerk which fails to include a certificate of service.

1 2. Report and Recommendation

2 IT IS RECOMMENDED that Plaintiff's Due Process claim, appearing as part of Count 1, be
3 **dismissed** with prejudice.

4 IT IS FURTHER RECOMMENDED that Plaintiff's Count 2 for Malicious Prosecution and
5 Count 3 for Imputed Negligence be **dismissed** with prejudice.

6 IT IS FURTHER RECOMMENDED that Plaintiff's claims regarding violatinos of Fed. R.
7 Crim. P. 4, 5, and 9 be **dismissed** with prejudice.

8 IT IS FURTHER RECOMMENDED that Plaintiff's claims against Dr. Saavedra and Nurse
9 Ubina in their official capacities, as stated in Counts 4 and 6 be **dismissed** with prejudice.

10 **NOTICE**

11 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
12 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
13 held that the courts of appeal may determine that an appeal has been waived due to the failure to file
14 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also
15 held that (1) failure to file objections within the specified time and (2) failure to properly address
16 and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal
17 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
18 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

19 DATED: November 8, 2019

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23 ELAYNA J. YOUCRAH
24 UNITED STATES MAGISTRATE JUDGE
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